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IN THE

Supreme Court of the United States

October Term, 1959
No. 166

PENNSYLVANIA LABOR RELATIONS BOARD,
Petitioner

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company,
Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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August A. Napoli, Trading and Doing Business as Seven-Up Bottling Company,

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner respectfully submits this Reply Brief to the Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania in the above entitled case.

The only purpose of this Reply Brief is to correct certain misstatements of fact and prejudicial inferences contained in the Respondent's Brief in Opposition. The Petitioner deems it necessary to bring these matters to the Court's attention in order that the certiorari petition be fairly considered.

Preliminarily, it should be noted that the Respondent characterizes the *de minimis* reference in *Fainblatt*[1] as a *dictum* (p. 4, l. 14).[2] The negligibility or *de minimis* principle as applied to the Commerce Clause of the Constitution and decisions involving the substantiality of the effect of an enterprise on interstate commerce can hardly be termed a *dictum*. It is a fundamental legal concept which this Court has repeatedly recognized. See Petition, p. 9, ll. 2-22.

The Respondent states that this Court in *Guss*[3] "... determined that less than $50,000.00 out-of-state inflow was not *de minimis* ..."[4] This is simply not the case. The appellant in *Guss* was a manufacturer of specialized photographic equipment for the Air Force on a contract basis. Although it is true that his out-of-state purchases were "... a little less than $50,000. ..."[5], he shipped his finished products "... *to Air Force bases, one within Utah and the others outside.* ..."[6] Neither this Court's opinion nor that of the lower court discloses the exact amount of the out-of-state sales involved, but it can reasonably be assumed that such sales were quite substantial.[7]

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[1] *NLRB v. Fainblatt et al.*, 306 U.S. 601 (1939).

[2] Page and line references not otherwise identified are to the Respondent's Brief in Opposition.

[3] *Guss, etc. v. Utah Labor Relations Board*, 353 U.S. 1 (1957).

[4] P. 5, ll. 13-14.

[5] 353 U.S. at 4.

[6] Ibid. Emphasis supplied.

[7] The record in *Guss* apparently contained no breakdown of the sales figures. The decision of the Utah Labor Relations Board is unreported.

The total amount of the appellant's contracts with the government or its agencies was $152,025.50.[8]

The Respondent also states that this Court in *Fairlawn* ". . . determined that $100,000.00 out-of-state inflow was not *de minimis*."[10] This statement is reasonably accurate as to *direct* out-of-state inflow, but the Court specifically makes it clear that *indirect*[11] out-of-state purchases were $100,000 or more.[12] The NLRB accumulates direct and indirect inflow for jurisdictional purposes, the Respondent has done so for the purposes of the present proceedings, and the precedents should be treated accordingly.

In like vein, the Respondent cites the *Stoller* case,[13] in which this Court refused certiorari, as a holding by the United States Court of Appeals for the Ninth Circuit that ". . . $12,000.00 out-of-state inflow was not *de minimis* . . ."[14] However, the business involved in *Stoller* was a laundry and dry cleaning establishment on an atomic energy reservation operated by the Atomic Energy Commission as a part of

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[8] *Guss etc. v. Utah Labor Relations Board et al.*, 5 Utah 2d 68, 296 P. 2d 733 (1956).

[9] *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957).

[10] P. 5, ll. 16-17.

[11] "*Indirect inflow* means the purchase of goods or services which originated outside the employer's state, but which he purchased from a seller within the state." NLRB Release R-576; 1 *CCH Labor Law Reporter* (4th Ed.), § 1610.

[12] 353 U.S. at 22.

[13] *NLRB v. Stoller et al.*, 207 F. 2d 305 (C.A. 9, 1953), cert. den. 347 U.S. 919 (1954).

[14] P. 5, ll. 21-22.

the national defense program. This was the controlling factor in the case, and *Stoller* is not a clear-cut authority that $12,000 inflow is not *de minimis* under the law.

The Respondent also maintains that the present case is not an appropriate one "for delimiting the *de minimis* theory" because he operates under a franchise from a national manufacturer. The Respondent contends that the National Labor Relations Board has jurisdiction in such a case irrespective of the amount of interstate commerce involved.[15]

In the first place, it should be noted that in all of the cases cited by the Respondent the amount of out-of-state inflow involved was quite substantial, ranging from over $300,000 to a minimum of $68,000 in one case. It is, therefore, obvious that the assumption of jurisdiction by the NLRB[16] was based on the immediacy and substantiality of the impact of the business involved on interstate commerce; the franchise factor was secondary and unnecessary to the decision.

Furthermore, although reference is made in these soft drink bottling cases to the fact that the company involved is an "affiliate of a group of manufacturers . . . in numerous States, operating under a franchise" and that the product "is marketed under a nationally advertised trademark," it is significant that the only

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[15] Pp. 8-10.

[16] "And the confirmation of this jurisdiction by United States Court of Appeals for the Fifth Circuit in *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 196 F. 2d 424, 426 (C.A. 5, 1952).

case on point in this Court concerned a retail Chevrolet dealer franchised by the General Motors Corporation.[17] The sweeping nature of the franchise in the *Howell* case is in sharp contrast to the facts in the instant case. The franchised automobile dealer is "closely supervised", must "make varied and detailed reports about his business affairs", "devote full time to Chevrolet sales", "keep his sales facilities at a location and conduct the business in a manner that satisfied General Motors", "permit General Motors to inspect Howell's books, accounts, facilities, stocks and accessories", and "keep such uniform accounting systems as General Motors might prescribe."[18] It is not surprising that this Court, after referring to the ". . . Many other terms of the agency agreement (which) also emphasized the interdependence of Howell's local and General Motor's national activities",[19] upheld the NLRB's finding that Howell was an integral part of General Motors' national system of distribution.

The only evidence adduced in the present case with respect to the Respondent's franchise from the Seven-Up Company of St. Louis is that the Respondent is obligated to buy all its extract from the St. Louis Company; that the latter has certain inspection rights as to the product and the cleanliness of the Respondent's establishment, and that the Respondent must maintain distribution to at least 75% of the accounts in his territory who handle Seven-Up.

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[17] *Howell Chevrolet Co. v. NLRB*, 346 U.S. 482 (1953).

[18] 346 U.S. at 483.

[19] Ibid.

The Petitioner submits that this type of franchise arrangement is a far cry from that closely knit relationship which exists in the automobile field, and that, absent facts which show that the business of the enterprise involved has a substantial effect on interstate commerce, the assertion of Federal jurisdiction should not be predicated upon the franchise factor.

CONCLUSION

The Petitioner submits that the Respondent has advanced no substantial reason to justify a refusal to grant the writ of certiorari prayed for in this case.

Respectfully submitted,

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August, 1959.